

THE ECOLOGY CENTER, ET AL.

IBLA 95-636

Decided December 18, 1998

Appeal from a decision of the Acting Area Manager, Garnet Resource Area, Bureau of Land Management, denying a protest of the East Fork Chamberlain Rehabilitation Plan. EA MT-074-04-26.

Affirmed.

1. Environmental Quality: Environmental Statements--
National Environmental Policy Act of 1969:
Environmental Statements--Timber Sales and Disposals

A BLM decision denying a protest of a proposed rehabilitation plan and salvage timber sale will be affirmed where the appellant fails to establish that BLM did not adequately consider matters of environmental concern. The party challenging a BLM decision has the burden of showing by objective proof that the determination was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion or disagreements do not suffice to establish that BLM's analysis is inadequate.

APPEARANCES: Bert Kraft, Missoula, Montana, for the Ecology Center and the Alliance for the Wild Rockies; 1/ John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Ecology Center and the Alliance for the Wild Rockies (Appellants) have appealed from the August 2, 1995, decision of the Acting Area Manager,

1/ Although the Ecology Center and the Alliance for the Wild Rockies are two distinct organizations with separate addresses, Kraft submitted both the protest and the appeal on behalf of each group. Kraft has not disclosed his relationship to those groups. For purposes of this appeal, we assume Kraft is authorized, under 43 C.F.R. § 1.3, to represent each of those organizations.

Garnet Resource Area, Bureau of Land Management (BLM), denying their protest of BLM's June 22, 1995, Finding of No Significant Impact/Decision Record (FONSI/DR) implementing the proposed East Fork Chamberlain Rehabilitation Plan (Plan), including the East Fork Chamberlain timber salvage sale, analyzed in the environmental assessment (EA) prepared for the Plan (EA MT-074-04-26).

On August 2, 1994, a lightening strike ignited the East Fork Chamberlain fire which burned 1,220 acres of land in portions of secs. 21, 22, 27, 28, 33, and 34, T. 14 N., R. 13 W., principal meridian, Powell County, Montana, including 715 acres of BLM land within the Chamberlain, East Fork Chamberlain, and Pearson Creek drainages and the Wales Creek Wilderness Study Area (WSA). See EA at 1-2; FONSI/DR at unnumbered p. 2. BLM proposed the Plan, including the East Fork Chamberlain timber salvage sale on October 20, 1994, as a means of accelerating recovery of forest watershed functions, improving wildlife and fisheries values, and salvaging merchantable dead timber. BLM recommended the salvage harvest to reduce the risk of future large scale wildfires, rejuvenate timber stands in the area, promote conifer regeneration, and reestablish big game hiding cover. (FONSI/DR at unnumbered p. 1-2.)

After evaluating public input received as part of the scoping process, BLM prepared the Plan EA. The EA identified six alternatives ranging from no further action to rehabilitation along with a salvage sale of the total area impacted by the fire, including the WSA. 2/ Alternative IV, the preferred alternative, provided for rehabilitation measures beyond those already taken as part of the fire suppression operation to further reduce erosion, protect water quality, and improve stream stability. Those actions included stabilization, maintenance, and surface drainage improvements on the East Fork and Main Chamberlain roads, livestock fencing, noxious weed control, and reforestation on 325 acres including the WSA. Alternative IV also entailed timber salvage on approximately 219 acres within sec. 28 and approximately 7 acres in sec. 34 outside the WSA, using conventional tractor skidding equipment, and specified that no new roads would be constructed but that improvements to the existing Jeep Trail would be necessary prior to using it to haul timber. (EA at 6.) The EA described the affected environment and analyzed the environmental consequences of implementing the alternatives, focusing on the effects to vegetation, wildlife, including threatened and endangered species, fisheries, watershed, soils, riparian areas, recreation, visual resources, and wilderness. BLM circulated the EA for public comments on March 7, 1995.

On April 27, 1995, BLM published a notice soliciting bids for the impending timber salvage sale and providing a 15-day protest period. On

2/ BLM simultaneously identified and eliminated Alternative II from consideration because that alternative required ground disturbing activities within the WSA which would conflict with the nonimpairment criteria stated in the 1993 Interim Management Policy and Guidelines for Land Under Wilderness Review.

May 8, 1995, the Acting Area Manager issued a decision implementing Alternative IV as described in the EA with the exception that no tree planting would occur in the WSA. Appellants appealed the Acting Area Manager's decision to the Board on May 30, 1995 (IBLA 95-495). BLM canceled the timber sale on June 8, 1995. On July 12, 1995, BLM asked the Board to dismiss the appeal and remand the case because the May 8, 1995, decision on the Plan had been vacated and all bids on the timber sale had been rejected. By order dated July 13, 1995, the Board vacated the Acting Area Manager's May 8, 1995, decision and remanded the case to BLM, noting that BLM did not have jurisdiction over the case when it had attempted to vacate its decision because the filing of the notice of appeal had removed the case from its jurisdiction.

In the FONSI/DR, 3/ the Acting Area Manager decided to implement Alternative IV as modified to eliminate tree planting in the WSA, finding that adoption of this alternative conformed to the Garnet Resource Management Plan (RMP) and environmental impact statement (EIS) and to BLM policies and regulations and would not have any significant impact on the human environment. He noted that under that preferred alternative approximately 2,600 MBF of timber salvage would be harvested from 219 acres in three harvest units, no new roads would be constructed, and the existing Jeep Trail would be renovated to use as a haul road for timber. He briefly outlined the rehabilitation measures featured in Alternative IV, including reforestation except within the WSA, road rehabilitation on both the East Fork and Main Chamberlain road systems, livestock fencing, weed control, and grass seeding. The Acting Area Manager explained that he had selected Alternative IV because it provided the greatest amount of rehabilitation and avoided activity within the WSA. The no action alternative was determined to be unacceptable, he added, because it would have created additional water quality impacts and slowed vegetative recovery of the burned area contrary to the need for the accelerated recovery of security cover in this important elk summer and fall range. He also adopted three additional mitigation measures supplementing those contained in the EA to reduce the loss of fines and dust, mitigate watershed problems, and minimize disturbance to hunters during the general hunting season.

A copy of the Notice for the East Fork Chamberlain Salvage Timber Sale was included with the FONSI/DR. The Notice, first published on June 22, 1995, identified itself as the forest management decision document for the Plan, including the sale, for purposes of protests and appeals under 43 C.F.R. Part 5003, and provided 15 days for the filing of objections to it or the associated EA. 4/

3/ We note that the Acting Area Manager issued the FONSI/DR on June 22, 1995, while the case was still pending on appeal and, therefore, removed from BLM's jurisdiction. See Clive Kincaid, 111 IBLA 224, 234 (1989); Melvin N. Berry, 97 IBLA 359, 361 (1987). Similarly, Appellants' July 5, 1995, protest was submitted while the Board had jurisdiction over this matter. However, because BLM's Aug. 2, 1995, decision on the protest was issued after it had regained jurisdiction over the case, we will not further address the jurisdictional issues raised by BLM's premature actions.

4/ BLM held the sale as advertised and awarded the contract.

Appellants protested the Plan and EA, identifying what they characterized as design, analytic, and bureaucratic problems. As to design flaws, they asserted that the Plan was not efficient, focused too heavily on commodity interests instead of ecology concerns, relied too much on best management practices to minimize impacts to water quality and soils, addressed only commodity production in its economic analysis, and ignored the possibility that salvage logging might not be the most effective way to aid the area in recovering from the fire. The alleged analytic faults, which Appellants contended emanated directly from the Plan's proharvesting bias, included inadequate analyses in the EA's discussion of cumulative effects on vegetation, economic benefits, wildlife and fisheries, watershed, soils, riparian areas, recreation, wilderness, and threatened and endangered species, and its evaluation of indirect effects on bald eagle habitat; over-emphasis on commodity values in the EA's determination of resource values; and incomplete evaluations of all elements related to timber resources and forest health. They defined the bureaucratic problem as BLM's desire to maximize its budget by contriving projects requiring high levels of management, like timber sales, which can also have detrimental environmental consequences, criticizing BLM's endorsement of industrial logging practices which fragment habitat and degrade resources and the EA's failure to address old growth issues.

Appellants further contended that the EA's analysis violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 102(2) (1994), by overlooking the indirect effects to bald eagles, omitting a thorough cumulative effects analysis, ignoring rehabilitation alternatives without a harvest or road construction, and disregarding biological corridors. They concluded that the EA did not provide enough information upon which to base the decision to implement the salvage harvest nor did it demonstrate that the harvest presented the best net public benefit.

In his decision denying the protest, the Acting Area Manager explained that he had selected the alternative best meeting the long-term big game summer and fall range management goals emphasized in the Garnet RMP for the public lands encompassed by the Plan. As to the alleged design flaws, the Acting Area Manager pointed out that, Appellants' skepticism about the need for the salvage timber harvest notwithstanding, the site conditions clearly demonstrated the need to remove a portion of the dead material to prepare the site for planting. He also clarified that best management practices embodied practical and effective standard practices to protect soil and water, not unusual measures designed solely to mitigate potential problems.

Addressing the asserted analytic deficiencies, the Acting Area Manager found that both the time frame and the geographic scope of the cumulative effects analyses in the EA properly corresponded to the reliability of the obtainable information and the available analysis tools for predicting outcomes. He explained that the EA's ostensible dearth of discussion of the Plan's impacts on various threatened and endangered species, including indirect effects on the bald eagle, stemmed from the lack of any adverse or beneficial effects to those species, citing language in the EA indicating that sensitive species would be addressed only if they would be affected by the Plan. He further noted that the Plan's reforestation

program was designed to promote forest health by restoring a diverse community of long-lived native trees, resistant to insects and disease. The Acting Area Manager considered the bureaucratic concerns raised by Appellants irrelevant to the Plan under review, adding that the Garnet RMP addressed old growth issues and that the Plan had no impact on unburned plant communities of any age on public land in the vicinity of the salvage or rehabilitation area.

The Acting Area Manager rejected Appellants' claimed NEPA violations. He reiterated that the EA had adequately addressed the nonexistent indirect effects to the bald eagle and the cumulative impacts of the Plan. He further pointed out that Alternative V analyzed in the EA, which provided for the rehabilitation of the area without any salvage timber harvesting or road building, mirrored the alternative suggested by Appellants and that biological corridors and biological diversity issues had been addressed in the Garnet RMP and its EIS. He stressed that, contrary to Appellants' contentions, the Plan was designed to accelerate the reestablishment of the patterns, structures, functions, and processes that characterized the affected ecosystem and that implementing the Plan best served the public interest. He therefore denied Appellants' protest.

On appeal, Appellants continue their opposition to the salvage timber harvest, addressing four areas of concern: erosion, rehabilitation, wildfire, and ecology. They concede that salvaging dead trees and planting new ones may speed the recovery of the area for big game habitat; however, they question the need for the timber sale given the soil disturbance and erosion caused by timber harvesting, including the recent extensive logging on adjacent private lands. Although they admit that sediment produced from the sale would probably not reach the East Fork Chamberlain Creek, they nevertheless contend that it would be safer if no sediment were created at all. They assert that, since road rehabilitation and tree planting will occur regardless of whether the timber is sold, harvesting of the timber is not crucial to the rehabilitation goals of the Plan and need not be undertaken. Appellants maintain that the risk for wildfire in the area has already been reduced by the removal of virtually all of the trees on private lands affected by the fire and submit that, even though removal of the trees proposed in the Plan would further reduce the risk of wildfire, the risk in the area is low enough to render the added precaution unnecessary. Finally, while recognizing the RMP's directive that management of the affected lands emphasize summer and fall big game range, Appellants aver that it would be more responsible to allow the public land to regenerate through natural means rather than attempt to accelerate the process by tampering with the still unknown ecosystem workings.

In response, BLM argues that Appellants have not met their burden of showing that the Acting Area Manager's decision violates applicable law. Specifically, BLM contends that not only have Appellants failed to demonstrate that erosion and soil disturbance impacts will occur, but, in fact, they concede that such impacts are not likely to materialize. BLM states that the Plan incorporated numerous actions designed to meet the objective of reducing soil erosion, including reforestation of the site using best management practices devised to keep erosion and stream sedimentation to a

minimum during timber harvest operations, and that its preference for the removal of down and standing dead timber to allow planting is amply justified. Appellants' contention that the sale should not take place because the funds it would generate are not needed for rehabilitation does not demonstrate that proceeding with the sale violates the law, BLM submits, given the multiple reasons for approving the sale addressed in the EA. BLM also insists that the salvage logging completed on adjacent private lands would not decrease the intensity of any fire started on or spreading to public lands because the magnitude of any such fire would be dictated by the amount of fuel remaining on the public lands and that its decision that salvage logging provided the better management option reflects its careful weighing of the impacts of both wildfires and salvage logging. While acknowledging that it does not know everything about the affected ecosystem, BLM nevertheless maintains that it developed the Plan based on the best available science and designed it to closely imitate and accelerate natural processes and that Appellants have not shown that it failed to consider natural recovery especially since the burned portion of the WSA will be allowed to recover naturally. BLM concludes that, at most, Appellants' arguments represent differences of opinion insufficient to justify reversing the Acting Area Manager's determination and that their appeal should be dismissed.

[1] A party challenging a BLM rehabilitation plan and timber sale bears the burden of demonstrating error in BLM's actions. Oregon Natural Resources Council, 115 IBLA 179, 182 (1990). Such error must be alleged with reasonable particularity and supported by objective proof. Id.; In re Crane Prairie Timber Sale, 109 IBLA 188, 195 (1989); In re Upper Flores Timber Sale, 86 IBLA 296, 305 (1985). BLM's decision will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant effects will occur is reasonable in light of the environmental analysis. See, e.g., Bill Armstrong, 131 IBLA 349, 350 (1994); G. Jon and Katherine M. Roush, 112 IBLA 293, 297 (1990); Hoosier Environmental Council, 109 IBLA 160, 172-73; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The party challenging the determination has the burden of showing by objective proof that it was premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. G. Jon and Katherine M. Roush, *supra*, at 298; Hoosier Environmental Council, *supra*, at 173; United States v. Husman, 81 IBLA 271, 273-74 (1984). Mere differences of opinion do not suffice to establish that BLM's analysis was inadequate. Friends of the Bow, 139 IBLA 141, 147 (1997); G. Jon & Katherine M. Roush, *supra*, at 298; Glacier-Two Medicine Alliance, *supra*, at 144. See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975).

In their appeal, Appellants have abandoned the specific allegations of error raised in their protest and concede that BLM has adequately addressed their concerns, a concession amply supported by the record. Instead, they simply restate that their opinions that the salvage timber sale is unnecessary to accomplish the goals of the rehabilitation plan and

that eliminating the sale would be the safer option. The fact that Appellants would prefer a different course of action from that adopted by BLM does not establish error in BLM's decision. See Friends of the Bow, supra, at 150. Accordingly, we conclude that Appellants have failed to satisfy their burden of showing that BLM's environmental analysis or decision to proceed with the salvage timber sale was erroneous.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge